

¹ May 29, 2003; February 11-12, 2004; February 17-18, 2004; and March 2, 2004.

oral arguments, the Court hereby enters its preliminary findings of fact and conclusions of law.

I. FINDINGS OF FACT

BACKGROUND

1. Plaintiffs Warren Reynolds, John Reynolds and Wilmington Trust Company, as trustee, own property located east of Penn Green Road in New Garden Township, Chester County, Pennsylvania (the “Reynolds Property”).

2. Warren Reynolds has resided on the Reynolds Property for the last forty-two years. He farms and lives on the Reynolds Property with his wife, their infant child and his wife’s two children. [2/12/04 N.T. at 81 (Reynolds)]

3. A 6 ½ acre pond is located on the Reynolds Property. The pond is fed by a stream called Trout Run, which is a tributary of the East Branch of the White Clay Creek. Congress designated Trout Run as a component of the National Wild and Scenic Rivers System, 16 U.S.C. § 1274(a)(162)(A), pursuant to the White Clay Creek Wild and Scenic Rivers System Act, Pub. L. 106-357, § 3, 114 Stat. 1393 (2000).

4. Warren Reynolds and his family have used the pond for fishing, swimming, boating and aesthetic enjoyment. [2/12/04 N.T. at 82 (Reynolds)] The Reynolds family no longer uses the pond for these purposes because, based on Mr. Reynolds’ observations of the pond’s color, quality and odor, Mr. Reynolds believes the pond is polluted. In addition to affecting his use of the pond, the condition of the pond causes Mr. Reynolds distress and anxiety. [2/12/04 N.T. at 83, 99, 113-115 (Reynolds)]

5. In 1996, Defendant M.A.Y. Farms, Inc. purchased a property adjacent to the eastern boundary of the Reynolds Property (the “MAY Property”). The MAY Property is upstream and

up-gradient from the Reynolds Property. M.A.Y. Farms, Inc. was specifically incorporated for the purpose of purchasing the MAY Property. [3/2/04 N.T. (Cutone)]²

6. The Reynolds Property and the MAY Property are located in southern Chester County, Pennsylvania, where mushroom farming is widespread. Mushrooms are grown in compost material inside mushroom houses. Spent mushroom substrate (“SMS”) is a waste material that remains after the mushrooms have been grown and harvested. SMS is composed of various organic materials but consists mostly of animal manure.

7. Michael Cutone directs and is responsible for the daily operations of M.A.Y. Farms, Inc. In addition, Mr. Cutone operates forty mushroom growing houses, eight of which are located on the MAY Property. [3/2/04 N.T. (Cutone)]

8. Defendant Rick’s Mushroom Service, Inc. (“Rick’s”) leases a portion of the MAY Property, and Defendant Richard Masha directs and is responsible for Rick’s daily operations. Rick’s does not grow mushrooms or any other crops. Rather, it receives SMS from area mushroom growers, stores and processes the SMS on-site, and then transports it off-site for disposal. Whatever SMS is not transported off-site is permitted to sit on the MAY Property for a year or more to allow certain constituents in the waste to leach out so that it can be sold as potting soil. Mr. Cutone is also involved in the day-to-day operations of Rick’s.

9. When M.A.Y. Farms, Inc. purchased the MAY Property in 1996, SMS covered almost the entire site in piles approximately five feet to fifteen feet deep. [3/2/04 N.T. (Cutone)]; [2/18/04 N.T. at 124 (Piller)]

10. When rain or other water falls on piles of SMS, it percolates down through the SMS,

² Transcripts of the March 2, 2004 hearing are unavailable as of the date of this Order.

absorbs constituents of the SMS and flows out as a black liquid commonly known as “leachate” or “wastewater.”

11. The Chester County Conservation District (“CCCD”) provides technical assistance to the local agricultural community and encourages the use of Best Management Practices (“BMPs”) to minimize environmental harm. The CCCD is not a regulatory agency; it is a technical assistance agency. [D-22 at 1, “Disclaimer”] The CCCD often works with mushroom farmers and facilities such as Rick’s to control stormwater runoff and off-site flow of leachate. Through the use of PL-566 contracts, the CCCD provides financial assistance and incentives for mushroom growers and others to develop BMPs for facilities within the Red and White Clay Creek watersheds.

12. In 1997, Mr. Masha contacted the CCCD to request assistance in developing a conservation plan for Rick’s operations at the MAY Property. The CCCD advised Mr. Masha to remove all SMS from the MAY Property and develop a Mushroom Farm Environmental Management Plan. The CCCD inspected the MAY Property and worked with Mr. Masha and Mr. Cutone to develop BMPs, including physical improvements and operational practices designed to prevent SMS leachate from leaving the MAY Property and entering the natural environment, including Trout Run.

13. In consultation with Mr. Masha, the CCCD developed a Mushroom Farm Environmental Management Plan for Rick’s (“MFEMP”). The MFEMP is based on a Pennsylvania Department of Environmental Protection (“DEP”) guidance document entitled Best Practices for Environmental Protection in the Mushroom Farm Community (“Mushroom Manual”). [D-4] The MFEMP calls for a system of structures designed to collect, control and dispose of leachate generated by Rick’s operations. The MFEMP is intended to minimize soil erosion, improve

ground and surface water quality, minimize odors, protect aquatic habitat and public health, and improve overall operations. The first version of the MFEMP is dated December 20, 1999, [D-22], and the most recent revision is dated August 2003. [P-13d, Ex. 2 at 2]

14. The United States Department of Agriculture's Natural Resources Conservation Service ("NRCS") designed a leachate collection and disposal system for Rick's ("Rick's Leachate Control System") that includes:

- (a) an uncovered 3.2 acre SMS storage area;
- (b) a concrete sedimentation basin;
- (c) a 1.4 million gallon wastewater storage impoundment lined with high density polyethylene ("HDPE"), which was actually constructed to hold 1.8 million gallons [P-73]; [2/18/04 N.T. at 95 (Vanderstappen)];
- (d) 3.2 acres of sprayfields (split between the north and south sprayfields), which, after construction, occupy 5 acres total [D-17]; and
- (e) 12 spray guns in two systems (6 in each sprayfield).

15. Rick's Leachate Control System uses gravity, land gradation and a surrounding earthen berm to direct leachate flow from the SMS piles into the sedimentation basin. From the sedimentation basin, the leachate flows into the larger impoundment, where it can be pumped into a system of pipes leading to the spray guns. Upon activation, the spray guns then apply the leachate to the sprayfields. NRCS designed the entire system to collect, store and dispose of leachate for a capacity of 90 days of rainfall plus a 25-year/24 hour storm event. [2/18/04 N.T. at 91-92 (Vanderstappen)]; [P-73]. Rick's installed the necessary components of its Leachate Control System in the summer and fall of 2000.

16. Defendants’ analysis of leachate collected from the north and south sprayfields shows elevated levels of ammonia nitrogen, fecal coliforms, total kjeldahl nitrogen, and potassium. [P-12 (5/27/03 Sampling Data)]; [5/29/03 N.T. at 127-37 (Miller)]

17. The MFEMP [P-13d, Ex. 2] and the Detailed Operations and Maintenance Requirements (“Operations Requirements”) [P-73] call for Rick’s to adopt certain operational practices designed to implement BMPs and prevent environmental harm.

18. Compliance with the MFEMP and the Operations Requirements is entirely voluntary. [2/18/04 N.T. at 55-56 (Greig)] However, DEP believes that operating in accordance with the MFEMP is the best way to limit the environmental impact of operations such as Rick’s. [2/12/04 N.T. at 24 (Feola)]

19. Rick’s has not complied with all operational requirements of the MFEMP and has harmed Plaintiffs as a result. Contrary to explicit directives in the MFEMP:

(a) Rick’s does not store SMS on a pad made of “concrete, asphalt, or low permeability, compacted, earthen material capable of containing all solids and collecting and diverting all wastewater.” [P-13d, Ex. 2 at 3] Portions of the concrete pad are cracked and in a state of disrepair, even though DEP requires that the concrete pad be “properly maintained.” Rick’s has not conducted adequate permeability testing of the soil underlying the SMS storage area. [P-83, Ex. 9 at 1 (DEP Technical Deficiency Letter of 9/16/03)]; [P-19 (12/4/03 DVD)]

(b) Rick’s has not verified that its SMS “is stored on soil separated at least 20 inches above the seasonal high water table during all periods of the year.” [P-13d, Ex. 2 at 3]; [P-13d (Masha Dep. at 32-33)]

(c) Rick’s does not have a valid permit from DEP for storing leachate in its

impoundment. [P-13d, Ex. 2 at 3]

(d) Rick's does not have a groundwater monitoring system, and it has not monitored the quality of groundwater under its facility. [P-13d, Ex. 2 at 3]; [P-13d (Masha Dep. at 37-39)]

(e) Rick's does not know whether it stores SMS in excess of permissible volumes. Under the most recent MFEMP, SMS storage volume cannot exceed 6,000 cubic yards per acre or 5 acres total. [P-13d, Ex. 2 at 4] Rick's does not know the actual SMS storage volume in cubic yards because it measures storage by the ton. Rick's does not keep adequate records to determine if it stores in excess of 6,000 cubic yards per acre of SMS. [P-13d (Masha Dep. at 32, 50-53)]

(f) Rick's does not aerate or agitate the leachate stored in the impoundment to reduce odors. [P-13d, Ex. 2 at 4, Masha Dep. at 49] Rick's operations produce a very strong, unpleasant odor,³ and those odors migrate to the Reynolds Property. [2/12/04 N.T. at 85 (Reynolds)]

(g) Rick's does not measure or monitor accurately the volume of leachate applied to the sprayfields because it does not presently have rain gauges in the sprayfields. The rain gauges were stolen or lost in December 2003. [P-13d (Masha Dep. at 92-93); [3/2/04 N.T. (Cutone)]] To comply with the leachate spray application limits required by the MFEMP and recommended by the Nutrient Management Plan,⁴ Rick's must keep a running total of the volume of leachate applied to the sprayfields. [P-83 (Markowitz Dep. at 107-08)]; [D-13 (Nutrient Management Plan at 8)]

³ Witness testimony on this point was insistent, colorful and unanimous.

⁴ Defendants' environmental consultant, Malcolm Pirnie, Inc., developed a Nutrient Management Plan for use in conjunction with the MFEMP and to establish spray irrigation application constraints for the sprayfields. [D-13 (Nutrient Management Plan at 1)]

(h) Rick's has not maintained the earthen berm to ensure it is impermeable. [P-13d, Ex. 2 at 5-7 ("storm-water management structures must be maintained to be serviceable at all times to control storm-water") ("leachate is contained within the SMS Storage Area by the berms and is diverted to and collected in the Sedimentation Basin and Lagoon")]. Parts of Rick's berm contain SMS, oyster bags,⁵ bottles, rocks, old tires, silt and other permeable materials. [P-19 (DVD)]; [2/11/04 N.T. at 82, 93, 99-100, 147-49 (McKee)] [5/29/03 N.T. at 81-83 (Miller)] These items threaten the integrity of the berm and allow leaking to occur. [2/11/04 N.T. at 82, 99, 175 (McKee)] DEP has recommended that Rick's "replace existing berm with an impervious material." [D-33 at 2 (inspection report of 6/18/03)] On at least one occasion, leachate flowed under the berm and outside the SMS storage area. [D-32 at 2-3 (inspection report of 3/12-13/03)] Leachate that flows outside the berm cannot be collected in the impoundment and creates a possibility of off-site contamination.⁶ [2/11/04 N.T. at 82 (McKee)]

(i) Rick's does not apply leachate to the sprayfields in a manner that prevents discharge of leachate off-site and into Trout Run. Rick's does not ensure that the vegetation in the sprayfields is capable of absorbing the volume of nutrients applied. [2/18/04 N.T. at 66 (Greig)]; [P-13d, Ex. 2 at 7] Rick's improperly operates its spray irrigation system outside the growing season and

⁵ At least according to defense counsel, oyster bags are used to grow oyster mushrooms. [2/11/04 N.T. at 149 (McKee)]. A berm composed of oyster bags is not impermeable. [2/11/04 N.T. at 175 (McKee)].

⁶ On occasion, Rick's has configured its piles of SMS to trap rainwater and recirculated leachate, thus creating "ponds" of leachate in the SMS storage area. [P-26 (aerial photos)] This practice is contrary to the MFEMP. [P-13d, Ex. 2 at 4, 5] Rick's created such ponds, however, to prevent overtopping and protect the integrity of the impoundment. [2/18/04 N.T. at 146-47, 166-67 (Piller)] DEP has not specifically disapproved of this procedure, but instructed Rick's to "be cautious with this strategy" because failure of one of these ponds "runs the risk of . . . sending a large volume of [leachate] to the lagoon." [D-34 at 2 (inspection report of 9/16/03)] Given the potentially catastrophic consequences associated with failure of the impoundment (e.g., releasing hundreds of thousands of gallons of leachate into the environment in a matter of seconds or otherwise rendering the impoundment permanently unusable), this is a reasonable practice.

when the ground is frozen, saturated, or otherwise incapable of absorbing leachate. [3/2/04 N.T. (Cutone) (Rick's operated sprayer system for five hours on 2/6-7/04)]; [2/11/04 N.T. at 34-35 (Wilson) (on 2/6/04, ground was "hard" and "ice covered")]; [2/11/04 N.T. at 173 (McKee) (spraying outside growing season is inconsistent with BMPs)] DEP disapproves of spraying leachate in such conditions. [2/12/04 N.T. at 72-73 (Felo)] On February 6, 2004, due in part to improper operation of Rick's spray irrigation system, leachate discharged from the north sprayfield into Trout Run and into the Reynolds' pond.⁷ [P-39 (photographs)]; [2/11/04 N.T. at 35 (Wilson)]; [2/12/04 N.T. at 85-86 (Reynolds)] Relatedly, Rick's has not prevented storm-water runoff from its facility. [P-13d, Ex. 2 at 3] In addition, Rick's spray irrigation system has sprayed leachate from the north sprayfield directly onto the Reynolds Property. [2/12/04 N.T. at 116 (Reynolds)]

(j) Rick's does not maintain the required two feet of freeboard in the impoundment. [P-73 at 1 (Operations Requirements require two feet of freeboard)]; [P-60 (12/11/03 photographs showing leachate covering top portion of HDPE liner)]; [2/17/04 N.T. at 20 (Powell)] Although Rick's Operation Requirements calls for hauling of excess leachate in extreme conditions or for land application at a suitable alternative site, Rick's has never taken either action, despite having a contract for this service with Wm. P. McGovern, Inc. [P-13d (Masha Dep. at 108-09, 130-31, Ex. 7)]; [P-73]

⁷ Prior to the February 6, 2004 incident, Plaintiffs' wastewater management systems expert, Mr. Miller, identified three possible discharge scenarios, including leachate entering Trout Run from the north sprayfield. [5/29/03 N.T. at 139 (Miller)]

II. CONCLUSIONS OF LAW

1. Plaintiffs have suffered a constitutionally cognizable injury in fact and have standing to pursue their claims. Plaintiffs have proven that they hold a reasonable belief that Rick's operations cause harm to the pond on the Reynolds Property by causing leachate discharges to enter Trout Run and the pond. This activity affects the Reynolds family in a concrete, particularized manner by reducing their use and enjoyment of the pond. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (“[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”) (internal quotes and citations omitted). See also Am. Canoe Assoc., Inc. v. Murphy Farms, Inc., 326 F.3d 505, 517-18 (4th Cir. 2003); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 155-61 (4th Cir. 2000) (en banc). Defendants argue that unless Plaintiffs can produce scientific evidence of harm to the pond, Plaintiffs lack standing. This argument has no merit. The relevant showing for purposes of Article III standing is not injury to the environment but injury to the plaintiff. Laidlaw, 528 U.S. at 181. Accordingly, Defendants' motion arguing that Plaintiffs cannot demonstrate injury-in-fact is denied.

2. Pennsylvania regulations provide that “a person . . . may not own or operate a residual waste disposal impoundment unless the [DEP] has first issued a permit to the person . . . for the facility under this subchapter.” 25 Pa. Code § 289.201(a); see also 25 Pa. Code § 299.142 (“a person . . . storing residual waste in a surface impoundment shall . . . [h]old a valid permit from the [DEP]” under the Clean Streams Law, 35 Pa. Stat. Ann. § 691.402). Defendants Rick's and Richard Masha are in violation of these regulatory requirements because:

(a) Rick's impoundment is a "residual waste disposal impoundment," i.e., a facility for disposal of residual waste using a "manmade excavation . . . formed primarily of earthen materials . . . [and] lined with synthetic materials, and which is designed to hold an accumulation of liquid wastes," 25 Pa. Code § 287.1;

(b) Rick's impoundment stores and disposes of leachate, which is a "residual waste," i.e., "discarded material or other waste, including solid, liquid, semisolid or contained gaseous materials resulting from . . . agricultural operations," id.;

(c) Rick's does not have a permit issued by DEP for operation of the impoundment; and

(d) Rick's does not comply with the MFEMP. Accordingly, Plaintiffs' motion for injunctive relief is granted on this ground. [2/12/04 N.T. at 37 (Feola) (permit required unless facility operates in conformity with MFEMP)]

3. Pennsylvania regulations provide that a "person . . . may not own or operate a land application facility for residual waste unless the [DEP] has issued a permit to that person or municipality under this chapter." 25 Pa. Code § 291.201. Defendants Rick's and Richard Masha are in violation of this regulatory requirement because:

(a) Rick's Wastewater Control System manages and disposes of leachate, a residual waste, by spraying it onto the sprayfields on the MAY Property, i.e., by land application, see 25 Pa. Code § 287.1;

(b) Rick's does not have a permit from DEP for operating a land application facility for residual waste; and

(c) Rick's does not comply with the MFEMP. [2/12/04 N.T. at 37 (Feola) (permit required unless facility operates in conformity with MFEMP)] Accordingly, Plaintiffs' motion

for injunctive relief is granted on this ground.

4. Rick's is not a "normal farming operation" under Pennsylvania residual waste management regulations. [2/12/04 N.T. at 32 (Feola)]; see 25 Pa. Code § 287.1. The mere presence of Mr. Cutone's mushroom houses on the MAY Property is not a relevant consideration in this regard because such activity is sufficiently unrelated to Rick's operations.

5. In deciding whether to grant a permanent injunction, the Court must consider whether: (a) the moving party has shown actual success on the merits; (b) the moving party will be irreparably injured by the denial of injunctive relief; (c) a permanent injunction will result in even greater harm to the defendant; and (d) the injunction would be in the public interest. Shields v. Zuccarini, 254 F.3d 476, 482 (3d Cir. 2001).

6. Plaintiffs have shown actual success on the merits of their claims under Count XI of the Complaint. As set forth above, Defendants are operating a residual waste disposal or processing facility without required permits.⁸

7. Plaintiffs will be irreparably injured without some injunctive relief. In Pennsylvania, the violation of an express statutory provision per se constitutes irreparable harm. Council 13, Am. Fed. of State, County and Mun. Employees, AFL-CIO v. Casey, 595 A.2d 670, 674 (Pa. Commw. Ct. 1991) (citing Pennsylvania Pub. Util. Comm'n v. Israel, 52 A.2d 317 (1947)). Irreparable harm is injury that cannot be adequately compensated by monetary relief. Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987). The injuries to Plaintiffs described supra are the kind

⁸ For present purposes, the Court denies Plaintiffs' motion for injunctive relief without prejudice to their right to renew it and seek an injunction for alleged discharges of pollutants into a navigable water from a point source without a permit in violation of the Clean Water Act and Pennsylvania Clean Streams Law. See 33 U.S.C. § 1311(a); 35 Pa. Stat. Ann. § 691.401; 25 Pa. Code § 92.3.

of environmental injury that “can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545 (1987). Unless Defendants take appropriate remedial action to limit the impact of their operations on the environment, including Trout Run, Plaintiffs will continue to suffer irreparable harm.

8. The permanent injunction sought by Plaintiffs will result in even greater harm to the Defendants. Plaintiffs seek an order compelling Defendants to empty the impoundment and to dispose of the wastewater, remove all SMS from the MAY Property, and refrain from stockpiling any additional SMS or other waste until Rick’s obtains appropriate permits. In essence, they seek to shut down Rick’s. This is an extremely harsh result that would have obvious serious economic consequences for Defendants. While Plaintiffs are entitled to redress, shutting down Rick’s will result in greater harm to Defendants than Plaintiffs are currently suffering. However, the Court is satisfied that the form of relief ordered below will address Defendants’ statutory violations and Plaintiffs’ injuries without visiting undue harm on Defendants.

9. Enjoining Rick’s continued operation is not in the public interest. It is undisputed that Chester County’s large mushroom farming community generates a great deal of SMS and requires an appropriate facility for its disposal. Prior to the development of facilities for appropriate SMS disposal, unauthorized dumping of SMS was a common, environmentally-harmful practice in southern Chester County. Rick’s provides an essential service for the mushroom farming community, its operational and structural shortcomings notwithstanding. The Court agrees with DEP’s assessment that facilities like Rick’s are necessary to protect the environment. [2/12/04 N.T. at 24 (Feola)]. Therefore, requiring Rick’s to cease operations is at

odds with the policy objectives of the Pennsylvania Clean Streams Law. See 35 Pa. Stat. Ann. § 691.4. However, an injunction narrowly tailored to require Defendants to comply with Pennsylvania regulatory requirements and the MFEMP, and thereby minimize the environmental impact of Rick's operations, is in the public interest.

III. SCOPE OF INJUNCTIVE RELIEF

1. Upon finding a violation of law, the Court has an obligation to order relief that it considers necessary to secure prompt compliance. In the case at bar, an injunction against Rick's continued operations is not the only way to achieve compliance with the Pennsylvania Clean Streams Law and applicable regulations. See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497-98 (2001) (courts exercising equitable powers have discretion to select a particular means of enforcing a statute).

2. Defendants have utilized the MFEMP and the Operations Manual to guide Rick's operations. DEP expects Rick's to follow the practices and guidelines identified in the MFEMP. However, as recounted supra, Defendants do not comply with the MFEMP's directives. The Court agrees with DEP that adherence to the MFEMP will assist in reducing the environmental impact of Rick's operations. Accordingly, Defendants must conduct their operations consistent with the MFEMP.

3. As explained supra, Pennsylvania law requires permits for Rick's operations. Accordingly, Rick's must apply for a permit for operating the impoundment and for operating a land application facility for residual waste.

4. After three and one half years of litigation, this matter appears to be escalating rather than resolving. The Court has expressed to counsel on numerous occasions that the formal litigation

process is unlikely to produce a just or satisfactory resolution. The recent hearings on Plaintiffs' motions have reinforced this impression. The Court bases this opinion not merely on the ineffable; there is evidence in the record demonstrating that this litigation has hampered efforts to address problems at Rick's. See, e.g., D-30 (inspection report of 10/10/01) ("The operator is currently involved in a court case with the neighboring property owner & will proceed with additional site work pending the resolution of this case."); D-32 (inspection report of 3/12-13/03) ("Mr. Masha is hesitant to take on any projects which will require significant capital investment until his court case with the neighboring property owner is concluded."); 3/2/04 N.T. (Piller) (noting Defendants' reluctance to undertake physical improvements to Rick's facility due to ongoing litigation). Counsel have attempted to settle amicably but without success.

Accordingly, the Court believes that a special master acting as a mediator is required in these circumstances.⁹ A mediator could invest the time and, perhaps more importantly, apply the *expertise* needed to effectively address the issues presented by this case. See Fed. R. Civ. P. 53(a)(1)(C) (authorizing appointment of a master to "address pretrial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge"). Outside of the adversarial litigation process, a mediator could assist Rick's in developing appropriate, cost-effective physical and operational controls to Plaintiffs' legitimate concerns.

While imposing on the parties the expense of a mediator gives the Court some pause, it is eminently preferable to permitting expenditure of additional (and probably greater) sums in advancing litigation that is unlikely to conclude within a reasonable period of time. See id. at

⁹ The Court has discussed such an appointment with counsel and Defendants have agreed to such an appointment; counsel for Plaintiffs have been less enthusiastic but have made no formal objection.

53(a)(3) (when appointing a master, the court must consider “the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay”). Mediation will enable the parties to concentrate their resources, financial and otherwise, on developing a practical solution to the problem. If the parties apply good faith efforts to the mediation process, this matter can be resolved more efficiently and fairly than through interminable litigation in this Court.¹⁰

The Court also believes that DEP should play an active role in mediation. DEP possesses valuable expertise and has already invested significant resources in its oversight of Rick’s. Of course, the Court cannot compel DEP to participate in mediation, but it can and will order the parties to invite DEP’s participation.

Today’s decision is entered without prejudice to renewal of Plaintiffs’ motions following a period of mediation and consultation with an environmental expert. Accordingly, nothing in today’s decision shall be construed to negate, reject, or adopt any fact or legal conclusion unless explicitly stated herein. Today’s decision also moots Plaintiffs’ Motion for Partial Summary Judgment.

An appropriate Order follows.

¹⁰ The parties and their counsel have applied an abundance of time, energy and faculties to this case, as the voluminous filings and protracted proceedings demonstrate. The Court expects all concerned to apply the same resources with equal force to the mediation process.

WARREN REYNOLDS, JOHN REYNOLDS,
through his guardians, Jacklen E. Powell and
Wilmington Trust Co., and WILMINGTON
TRUST CO., as Trustee,
Plaintiffs

**RICK'S MUSHROOM SERVICE, INC.,
M.A.Y. FARMS, INC., and RICHARD
MASHA,
Defendants**

CIVIL ACTION
NO. 01-3773

AND NOW, this 29th day of March, 2004, upon consideration of Plaintiffs’ Motion for Injunctive Relief [Docs. # 40-41], and Defendants’ oppositions thereto, it is hereby **ORDERED** that Plaintiffs’ Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendants shall apply to the Pennsylvania Department of Environmental Protection for a permit for operation of Rick's residual waste disposal impoundment;
2. Defendants shall apply to the Pennsylvania Department of Environmental Protection for a permit for operation of a land application facility for residual waste;
3. Defendants shall, within ninety days of the date of this Order, correct the operational deficiencies identified at Part I, ¶ 19 of the Court's Findings of Fact, and otherwise comply with the requirements of the Mushroom Farm Environmental Management Plan for Rick's, the Manual for Best Practices in the Mushroom Farm Community, the Nutrient Management Plan and the Detailed Operations and Maintenance Requirements for Rick's.
4. The balance of Plaintiffs' Motion is **DENIED WITHOUT PREJUDICE** subject to

renewal following a period of mediation outlined by subsequent Court Order. Upon renewal, if any, the Court will reconsider whether other relief, penalties, and/or sanctions are appropriate.

5. Upon consideration of Defendants' Motion for Order to Deny Plaintiffs' Motion for a Preliminary Injunction as a Matter of Law [Doc. # 101], and for the reasons set forth in the attached Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that Defendants' Motion is **DENIED** in its entirety.

6. It is further **ORDERED** that Plaintiffs' Motion for Imposition of Civil Penalties [Docs. No. 74-75] is **DENIED WITHOUT PREJUDICE** subject to renewal following a period of mediation outlined by subsequent Court Order.

7. It is further **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment [Docs. # 81-83] is **DENIED WITHOUT PREJUDICE AS MOOT**, the issues addressed therein having been addressed in the Court's Findings of Fact and Conclusions of Law and in this Order.

8. It is further **ORDERED** that the parties shall, within ten (10) days of the date of this Order, consistent with Federal Rule of Civil Procedure 53, propose to the Court candidates for appointment as a master in this case. The Court will enter a subsequent Order to govern further proceedings related to the appointment of a master.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.